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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MEGAN SCHMITT, DEANA REILLY, CAROL ORLOWSKY, and STEPHANIE MILLER BRUN, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

YOUNIQUE, LLC,

Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**[PROPOSED] [AGREED] JOINT JURY INSTRUCTIONS**

Pretrial Conference: February 4, 2019  
Trial Date: February 19, 2019

**DRAFT JURY INSTRUCTIONS**

The parties hereby provide the Court with a set of draft jury instructions. Consistent with Dkt. 57 (6:18-21) and the form pretrial conference

1 order appended to the Local Rules as Appendix A, Plaintiffs will file the final set of  
 2 jury instructions at least 7 days prior to the start of trial.

<u>NO.</u>	<u>DESCRIPTION</u>	<u>SOURCE</u>	<u>PG.</u>
1.	Duty of Jury	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.2	7
2.	Duty of Jury (Court reads and provides written instructions at end of case)	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.4	8
3.a	Claims and Defenses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.5	9
3.b	Claims and Defenses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.5	10
4.	Burden of Proof – Preponderance of the Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.6	12
5.	Burden of Proof – Clear and Convincing Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.7	12
6.	Class Action Defined	Judicial Council of California Civil Jury Instructions No. 338	13
7.	Materiality Defined	<i>Mazza v. Am. Honda Motor Co. Inc.</i> , 666 F.3d 581, 596 (9th Cir. 2012)	15
8.	Class-Wide Materiality	<i>Massachusetts Mut. Life Ins. Co. v. Superior Court</i> , 97 Cal.App.4th 1282 (2002)	16
9.	Class-Wide Exposure	<i>Mazza v. Am. Honda Motor Co. Inc.</i> , 666 F.3d 581, 596 (9th Cir. 2012)	16
10.	What is Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.9	17
11.	What is Not Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.10	18
12.	Evidence for a Limited Purpose	Manual of Model Civil Jury Instructions for the District Courts	19

		of the Ninth Circuit No. 1.11	
1	13.	Direct and Circumstantial Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.12
2	14.	Ruling on Objections	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.13
3	15.	Credibility of Witnesses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.14
4	16.	Conduct of the Jury	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.15
5	17.	Publicity During Trial	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.16
6	18.	Taking Notes	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.18
7	19.	Bench Conferences and Recesses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.20
8	20.	Outline of Trial	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.21
9	21.	Stipulated Testimony	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.1
10	22.	Stipulations of Fact	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.2
11	23.	Judicial Notice	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.3
12	24.	Deposition in Lieu of Live Testimony	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.4
13	25.	Impeachment Evidence - Witness	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.9
14	26.	Use of Interrogatories of a Party	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.11
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1	27.	Expert Opinion	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.13	34
2	28.	Charts and Summaries Not Received in Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.14	35
3	29.	Charts and Summaries in Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.15	36
4	30.	Evidence in Electronic Format	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.16	36
5	31.	Duty to Deliberate	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.1	38
6	32.	Communication with Court	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.3	39
7	33.	Return of Verdict Form	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.5	40
8	34.	Corporations – Fair Treatment	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.1	41
9	35.	Liability of Corporations – Scope of Authority Not In Issue	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.2	42
10	36.	Scope of Authority Defined	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.5, without change.	42
11	37.	Independent Contractor – Definition	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.14, without change.	43
12	38.	Agent and Principal -- Definition	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.4	44
13	39.	Principal Sued but not Agent— Agency or Authority Denied	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.12.	45
14	40.	Ratification	Manual of Model Civil Jury Instructions for the District Courts	46

		of the Ninth Circuit No. 4.7	
1	41.	Act of Agent is Act of Principal	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.8
2	42.a	Damages – Proof	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.1
3	42.b	Damages – Proof	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.1
4	43.a	Punitive Damages	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.5.
5	43.b	Punitive Damages	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.5; Cal. Civ. Code § 3294; and <i>Hardt v. Chrysler Group LLC</i> , 2015 U.S. Dist. LEXIS 187386, *28-29 (C.D. Cal. June 15, 2015).
6	XX	Plaintiffs' Placement of Clear and Convincing Instruction	
7	44.	Arguments of Counsel not Evidence of Damages	Judicial Council of California Civil Jury Instructions No. 3925, without change.
8	45.	Experts – Questions Containing Assumed Facts	Judicial Council of California Civil Jury Instructions No. 220
9	46.a	Consumers Legal Remedies Act- Essential Factual Elements	Judicial Council of California Civil Jury Instructions No. 4700
10	46.b	Consumers Legal Remedies Act- Essential Factual Elements	Judicial Council of California Civil Jury Instructions No. 4700
11	47.	Consumers Legal Remedies Act: Damages – For Plaintiff Schmitt	<i>Chowning v. Kohl's Dep't Stores, Inc.</i> , 735 Fed. Appx. 924, 924-25, n. 1 (2018) (citing <i>Colgan v. Leatherman Tool Grp., Inc.</i> , 135 Cal.App.4th 663 (2006))
12	48.	Consumers Legal Remedies Act: Damages – For California Class	<i>Chowning v. Kohl's Dep't Stores, Inc.</i> , 735 Fed. Appx. 924, 924-25, n. 1 (2018) (citing <i>Colgan v. Leatherman Tool Grp., Inc.</i> , 135 Cal.App.4th 663 (2006)).
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1	49.a	Ohio Implied Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.13	63
2	49.b	Ohio Implied Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.13	63
3	50.a	Ohio Express Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.11	64
4	50.b	Ohio Express Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.11	65
5	51.a	Ohio Buyer's Damages for Breach of Warranty of Accepted Goods	Ohio Civil Jury Instructions, 1 505 OJI CV 505.45	68
6	51.b	Ohio Buyer's Damages for Breach of Warranty of Accepted Goods	Ohio Civil Jury Instructions, 1 505 OJI CV 505.45	68
7	52.a	Magnuson-Moss Warranty Claims	<i>Clemens v. DaimlerChrysler Corp.</i> , 534 F.3d 1017, 1022 (9th Cir. 2008)	70
8	52.b	Magnuson-Moss Warranty Claims	<i>Clemens v. DaimlerChrysler Corp.</i> , 534 F.3d 1017, 1022 (9th Cir. 2008); Doc. 136 Order on Summary Judgment at page 14.	70
9	53.a	Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) Elements	3 Florida Forms of Jury Instruction § 65.80; <i>Urling v. Helms Exterminators, Inc.</i> , 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); <i>Trans World Accounts, Inc. v FTC</i> , 594 F.2d 212 (9th Cir. 1979)	71
10	53.b	Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) Elements	3 Florida Forms of Jury Instruction § 65.80; <i>Urling v. Helms Exterminators, Inc.</i> , 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); <i>Trans World Accounts, Inc. v FTC</i> , 594 F.2d 212 (9th Cir. 1979)	72
11	54.a	Florida Deceptive and Unfair Trade Practices Act: Damages	<i>Rollins, Inc. v. Butland</i> , 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)	75
12	54.b	Florida Deceptive and Unfair Trade Practices Act: Damages	<i>Rollins, Inc. v. Butland</i> , 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)	75
13	55.	Affirmative Defense—Statute of Limitations	Judicial Council of California Civil Jury Instructions No. 338	76
14	56.	Affirmative Defense - Standing	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 560-61 and n.1 (1992)	77
15	57.	Affirmative Defense –	Judicial Council of California	78

	Compliance	Civil Jury Instructions No. 4207 (for good faith); <i>Troyk v. Farmers Group, Inc.</i> , 171 Cal.App.4th 1305, 1332-3 (2009) (for compliance).	
58.	Affirmative Defense – Laches	<i>Jarrow Formulas, Inc. v. Nutrition Now, Inc.</i> , 304 F.3d 829, 835 (9th Cir. 2002).	79
59.	Affirmative Defense - Unjust Enrichment	<i>Lectrodryer v. Seoulbank</i> , 77 Cal.App.4th 723, 726 (2000); <i>accord, Media Services Group, Inc. v. Bay Cities Comm., Inc.</i> , 237 F.3d 1326, 1330-31 (11th Cir. 2001)	80
60.	Affirmative Defense - Offset	<i>Garg v. People ex rel. State Bd. of Equalization</i> , 53 Cal.App.4th 199, 211-12 (1997); citing <i>Jess v. Herrmann</i> , 26 Cal.3d 131, 142 (1979)	81

## INSTRUCTION NO. 1

### **Duty of Jury**

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it

1 to you whether you agree with it or not. And you must not be influenced by any  
2 personal likes or dislikes, opinions, prejudices or sympathy. That means that you  
3 must decide the case solely on the evidence before you. You will recall that you  
4 took an oath to do so.

5 Please do not read into these instructions or anything I may say or do that I  
6 have an opinion regarding the evidence or what your verdict should be.

7 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
8 Circuit No. 1.2, without change.

9  
10 PROPOSED BY: BOTH PLAINTIFFS AND

11 DEFENDANT

12 GIVEN AS PROPOSED \_\_\_\_\_

13 GIVEN AS MODIFIED \_\_\_\_\_

14 GIVEN ON COURT'S OWN \_\_\_\_\_

15 MOTION

16 REFUSED \_\_\_\_\_

17 WITHDRAWN \_\_\_\_\_

18  
19 **INSTRUCTION NO. 2**

20 **Duty of Jury**

21 **(Court reads and provides written instructions at end of case)**

22 Members of the Jury: Now that you have heard all of the evidence and the  
23 arguments of the attorneys, it is my duty to instruct you on the law that applies to  
24 this case.

25 Each of you has received a copy of these instructions that you may take with  
26 you to the jury room to consult during your deliberations.

27 It is your duty to find the facts from all the evidence in the case. To those

1 facts you will apply the law as I give it to you. You must follow the law as I give it  
2 to you whether you agree with it or not. And you must not be influenced by any  
3 personal likes or dislikes, opinions, prejudices, or sympathy. That means that you  
4 must decide the case solely on the evidence before you. You will recall that you  
5 took an oath to do so.

6 Please do not read into these instructions or anything that I may say or do or  
7 have said or done that I have an opinion regarding the evidence or what your verdict  
8 should be.

9

10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
11 Circuit No. 1.4, without substantive change.

12

13 PROPOSED BY: BOTH PLAINTIFFS AND

14 DEFENDANT

15 GIVEN AS PROPOSED \_\_\_\_\_

16 GIVEN AS MODIFIED \_\_\_\_\_

17 GIVEN ON COURT'S OWN \_\_\_\_\_

18 MOTION

19 REFUSED \_\_\_\_\_

20 WITHDRAWN \_\_\_\_\_

21

### 22 INSTRUCTION NO. 3

#### 23 Claims And Defenses

##### 24 **3.a Plaintiffs' Proposed Modified Instruction.**

25 To help you follow the evidence, I will give you a brief summary of the  
26 positions of the parties:

27

28

1 The plaintiffs assert that Younique sold Moodstruck 3d Fiber Lashes for  
2 \$29 and claimed that the lashes were made of “Natural Fibers” and “100%  
3 Natural Green Tea Fibers” but the fibers were neither. Plaintiffs have asserted  
4 this claim under the laws of California as well as Ohio and Florida. Later  
5 instructions will address the exact claims. The plaintiffs have the burden of  
6 proving these claims.

7 The defendant denies those claims and also contends that Plaintiffs' and the  
8 Class claims are barred by (1) the statute of limitations, (2) lack of standing, (3)  
9 Younique's compliance with law, (4) the doctrine of laches, (5) Plaintiffs'  
10 failure to mitigate damages, (6) the doctrine of unjust enrichment, and/or (6)  
11 the defense of offset. *[defendant's counterclaims and/or affirmative defenses]*.  
12 [The defendant Younique has the burden of proof on these *counterclaims and/or*  
13 *affirmative defenses.]*  
14 [The plaintiff Plaintiffs deny Younique's *[defendant's counterclaims and/or*  
15 *affirmative defenses].*

### **17 || 3.b Defendant's Proposed Modified Instruction.**

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

20 The plaintiffs assert that Younique sold Moodstruck 3d Fiber Lashes for  
21 \$29 and claimed that the lashes were made of “Natural Fibers” and “100%  
22 Natural Green Tea Fibers” but the fibers were really ground up nylon.  
23 Plaintiffs have asserted this claim under the laws of California as well as Ohio  
24 and Florida. Later instructions will address the exact claims. The plaintiffs  
25 have the burden of proving these claims.

26 The defendant denies those claims and also contends that **Plaintiffs'** and the  
27 **Class claims are barred by (1) the statute of limitations, (2) lack of standing, (3)**

1 Younique's compliance with law, (4) the doctrine of laches, (5) Plaintiffs'  
2 failure to mitigate damages, (6) the doctrine of unjust enrichment, and/or (6)  
3 the defense of offset. [defendant's counterclaims and/or affirmative defenses].

4 [The defendant Younique has the burden of proof on these counterclaims and/or  
5 affirmative defenses..]

6 [The plaintiff Plaintiffs deny Younique's defendant's counterclaims and/or  
7 affirmative defenses].]

8

9           **Original:**

10           To help you follow the evidence, I will give you a brief summary of the  
11 positions of the parties:

12           The plaintiff asserts that [plaintiff's claims]. The plaintiff has the burden of  
13 proving these claims.

14           The defendant denies those claims [and also contends that [defendant's  
15 counterclaims and/or affirmative defenses]]. [The defendant has the burden of proof  
16 on these [counterclaims and/or affirmative defenses.]]

17           [The plaintiff denies [defendant's counterclaims and/or affirmative  
18 defenses].]

19

20           **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
21 Circuit No. 1.5.

22

23 PROPOSED BY: .

24 GIVEN AS PROPOSED \_\_\_\_\_

25 GIVEN AS MODIFIED \_\_\_\_\_

26 GIVEN ON COURT'S OWN \_\_\_\_\_

27 MOTION

1 REFUSED \_\_\_\_\_

2 WITHDRAWN \_\_\_\_\_

3

4 **INSTRUCTION NO. 4**

5 **Burden of Proof—Preponderance of the Evidence**

6 When a party has the burden of proving any claim **or affirmative defense** by  
7 a preponderance of the evidence, it means you must be persuaded by the evidence  
8 that the claim or affirmative defense is more probably true than not true.

9 You should base your decision on all of the evidence, regardless of which  
10 party presented it.

11

12 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
13 Circuit No. 1.6, without substantive change.

14

15 PROPOSED BY: BOTH PLAINTIFFS AND

16 DEFENDANT

17 GIVEN AS PROPOSED \_\_\_\_\_

18 GIVEN AS MODIFIED \_\_\_\_\_

19 GIVEN ON COURT'S OWN \_\_\_\_\_

20 MOTION

21 REFUSED \_\_\_\_\_

22 WITHDRAWN \_\_\_\_\_

23

24 **INSTRUCTION NO. 5**

25 **Burden of Proof—Clear and Convincing Evidence**

26 When a party has the burden of proving any claim or defense by clear and  
27 convincing evidence, it means that the party must present evidence that leaves you

28

1 with a firm belief or conviction that it is highly probable that the factual contentions  
2 of the claim or defense are true. This is a higher standard of proof than proof by a  
3 preponderance of the evidence, but it does not require proof beyond a reasonable  
4 doubt.

5

6 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
7 Circuit No. 1.7, without change.

8 PROPOSED BY: BOTH PLAINTIFFS AND DEFENDANT

9 **(Plaintiffs disagree on order of this instruction and believe it should follow  
10 punitive damages)**

11 GIVEN AS PROPOSED \_\_\_\_\_

12 GIVEN AS MODIFIED \_\_\_\_\_

13 GIVEN ON COURT'S OWN \_\_\_\_\_

14 MOTION \_\_\_\_\_

15 REFUSED \_\_\_\_\_

16 WITHDRAWN \_\_\_\_\_

17

18 **INSTRUCTION NO. 6**

19 **Class Action Defined**

20 **Modified:**

21 A class action is a lawsuit that has been brought by one or more plaintiffs on  
22 behalf of a larger group of people who have similar legal claims. All of these people  
23 together are called a "class." **Plaintiffs Schmitt, Brun, and Reilly** bring this action  
24 as the class representatives.

25 In a class action, the claims of many individuals can be resolved at the same  
26 time instead of requiring each member to sue separately. Because of the large  
27 number of claims that are at issue in this case, not everyone in the class will testify.

28

1 You may assume that the evidence at this [stage of the] trial applies to all class  
2 members [except as I specifically tell you otherwise]. All members of the class will  
3 be bound by the result of this trial.

4 In this case, the class(es) consist(s) of the following:

5 **(1) California Class. All California consumers who purchased stand-**  
6 **alone Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**  
7 **personal, family, or household use.**

8 **(2) Ohio Class. All Ohio consumers who purchased stand-alone**  
9 **Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**  
10 **personal, family, or household use.**

11 **(3) Florida Class. All Florida consumers who purchased stand-alone**  
12 **Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**  
13 **personal, family, or household use.**

14

15 **Original:**

16 A class action is a lawsuit that has been brought by one or more plaintiffs on  
17 behalf of a larger group of people who have similar legal claims. All of these people  
18 together are called a “class.” [Name of plaintiff] brings this action as the class  
19 representative.

20 In a class action, the claims of many individuals can be resolved at the same  
21 time instead of requiring each member to sue separately. Because of the large  
22 number of claims that are at issue in this case, not everyone in the class will testify.  
23 You may assume that the evidence at this [stage of the] trial applies to all class  
24 members [except as I specifically tell you otherwise]. All members of the class will  
25 be bound by the result of this trial.

26 In this case, the class(es) consist(s) of the following:  
27 [Describe each class]

1           **Source:** Judicial Council of California Civil Jury Instructions No. 338

2           PROPOSED BY: BOTH PLAINTIFFS AND  
3           DEFENDANT

4           GIVEN AS PROPOSED \_\_\_\_\_

5           GIVEN AS MODIFIED \_\_\_\_\_

6           GIVEN ON COURT'S OWN \_\_\_\_\_

7           MOTION

8           REFUSED \_\_\_\_\_

9           WITHDRAWN \_\_\_\_\_

10

11           **INSTRUCTION NO. 7**

12           **Materiality Defined**

13           It is Plaintiffs' burden to show that there was uniform, Class-wide exposure to  
14 the Moodstruck 3D Fiber Lashes label. A consumer who was not exposed to the  
15 label cannot recover.

16

17           **Source:** *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581, 596 (9th Cir. 2012)

18           PROPOSED BY: **DEFENDANT**

19           **ONLY**

20           GIVEN AS PROPOSED \_\_\_\_\_

21           GIVEN AS MODIFIED \_\_\_\_\_

22           GIVEN ON COURT'S OWN \_\_\_\_\_

23           MOTION

24           REFUSED \_\_\_\_\_

25           WITHDRAWN \_\_\_\_\_

26

27

28

## **INSTRUCTION NO. 8**

## **Class-wide Materiality**

It is Plaintiffs' burden to show that a material misrepresentation was made to the entire Class.

**Source:** *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282 (2002)

**PROPOSED BY: DEFENDANT**

ONLY

10 | GIVEN AS PROPOSED \_\_\_\_\_

## 11 | GIVEN AS MODIFIED \_\_\_\_\_

12 | GIVEN ON COURT'S OWN \_\_\_\_\_

13 | MOTION

14 | REFUSED \_\_\_\_\_

15 | WITHDRAWN \_\_\_\_\_

## **INSTRUCTION NO. 9**

## Class-wide Exposure

19 It is Plaintiffs' burden to show that there was uniform, Class-wide exposure to  
20 the Moodstruck 3D Fiber Lashes label. A consumer who was not exposed to the  
21 label cannot recover.

<sup>23</sup> | Source: *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581, 596 (9th Cir. 2012)

**PROPOSED BY: DEFENDANT**

ONLY

<sup>26</sup> GIVEN AS PROPOSED

<sup>27</sup> || GIVEN AS MODIFIED

1 GIVEN ON COURT'S OWN \_\_\_\_\_  
2 MOTION \_\_\_\_\_  
3 REFUSED \_\_\_\_\_  
4 WITHDRAWN \_\_\_\_\_  
5

6 **INSTRUCTION NO. 10**

7 **What is evidence**

8 The evidence you are to consider in deciding what the facts are consists of:

9       1. the sworn testimony of any witness;  
10      2. the exhibits that are admitted into evidence;  
11      3. any facts to which the lawyers have agreed; and  
12      4. any facts that I [may instruct] [have instructed] you to accept as  
13      proved.

14

15 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
16 Circuit No. 1.9, without change.

17

18 PROPOSED BY: BOTH PLAINTIFFS AND  
19 DEFENDANT

20 GIVEN AS PROPOSED \_\_\_\_\_

21 GIVEN AS MODIFIED \_\_\_\_\_

22 GIVEN ON COURT'S OWN \_\_\_\_\_

23 MOTION \_\_\_\_\_

24 REFUSED \_\_\_\_\_

25 WITHDRAWN \_\_\_\_\_

## **INSTRUCTION NO. 11**

## What is not evidence.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they **may say** in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that is excluded or stricken, or that you **are** instructed to disregard, is not evidence and must not be considered. In addition some evidence **may be** received only for a limited purpose; when I **instruct** you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

4. Anything you may **see or hear** when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.10, without change.

**PROPOSED BY: BOTH PLAINTIFFS AND  
DEFENDANT**

1 GIVEN AS PROPOSED \_\_\_\_\_  
2 GIVEN AS MODIFIED \_\_\_\_\_  
3 GIVEN ON COURT'S OWN \_\_\_\_\_  
4 MOTION \_\_\_\_\_  
5 REFUSED \_\_\_\_\_  
6 WITHDRAWN \_\_\_\_\_  
7

8 **INSTRUCTION NO. 12**

9 **Evidence for a limited purpose.**

10 Some evidence may be admitted only for a limited purpose.

11 When I instruct you that an item of evidence has been admitted only for a  
12 limited purpose, you must consider it only for that limited purpose and not for any  
13 other purpose.  
14

15 [The testimony [you are about to hear] [you have just heard] may be considered only  
16 for the limited purpose of **[describe purpose]** and not for any other purpose.]<sup>1</sup>  
17

18 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
19 Circuit No. 1.11, without change.  
20

21 PROPOSED BY: BOTH PLAINTIFFS AND  
22 DEFENDANT

23 GIVEN AS PROPOSED \_\_\_\_\_  
24 GIVEN AS MODIFIED \_\_\_\_\_  
25 GIVEN ON COURT'S OWN \_\_\_\_\_  
26 MOTION \_\_\_\_\_  
27

28 <sup>1</sup> Instruction to be given when applicable.

1 REFUSED \_\_\_\_\_

2 WITHDRAWN \_\_\_\_\_

3

4 **INSTRUCTION NO. 13**

5 **Direct and Circumstantial Evidence**

6 Evidence may be direct or circumstantial. Direct evidence is direct proof of a  
7 fact, such as testimony by a witness about what that witness personally saw or heard  
8 or did. Circumstantial evidence is proof of one or more facts from which you could  
9 find another fact. You should consider both kinds of evidence. The law makes no  
10 distinction between the weight to be given to either direct or circumstantial  
11 evidence. It is for you to decide how much weight to give to any evidence.

12 **By way of example, if you wake up in the morning and see that the  
13 sidewalk is wet, you may find from that fact that it rained during the night.  
14 However, other evidence, such as a turned on garden hose, may provide a  
15 different explanation for the presence of water on the sidewalk. Therefore,  
16 before you decide that a fact has been proved by circumstantial evidence, you  
17 must consider all the evidence in the light of reason, experience and common  
18 sense.<sup>2</sup>**

19

20 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
21 Circuit No. 1.12.

22

23 PROPOSED BY: BOTH PLAINTIFFS AND

24 DEFENDANT

25 GIVEN AS PROPOSED \_\_\_\_\_

26 GIVEN AS MODIFIED \_\_\_\_\_

27

28

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<sup>2</sup> Hypothetical given in model civil jury instructions.

1 GIVEN ON COURT'S OWN \_\_\_\_\_  
2 MOTION \_\_\_\_\_  
3 REFUSED \_\_\_\_\_  
4 WITHDRAWN \_\_\_\_\_  
5

6 **INSTRUCTION NO. 14**

7 **Ruling on Objections.**

8 There are rules of evidence that control what can be received into evidence.  
9 When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the  
10 other side thinks that it is not permitted by the rules of evidence, that lawyer may  
11 object. If I overrule the objection, the question may be answered or the exhibit  
12 received. If I sustain the objection, the question cannot be answered, and the exhibit  
13 cannot be received. Whenever I sustain an objection to a question, you must ignore  
14 the question and must not guess what the answer might have been.

15 Sometimes I may order that evidence be stricken from the record and that you  
16 disregard or ignore that evidence. That means when you are deciding the case, you  
17 must not consider the stricken evidence for any purpose.

18  
19 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
20 Circuit No. 1.13, without change.

21  
22 PROPOSED BY: BOTH PLAINTIFFS AND  
23 DEFENDANT  
24 GIVEN AS PROPOSED \_\_\_\_\_  
25 GIVEN AS MODIFIED \_\_\_\_\_  
26 GIVEN ON COURT'S OWN \_\_\_\_\_  
27 MOTION  
28

1 REFUSED \_\_\_\_\_

2 WITHDRAWN \_\_\_\_\_

3

#### 4 **INSTRUCTION NO. 15**

##### 5 **Credibility of Witnesses**

6 In deciding the facts in this case, you may have to decide which testimony to  
7 believe and which testimony not to believe. You may believe everything a witness  
8 says, or part of it, or none of it.

9 In considering the testimony of any witness, you may take into account:

10 1. the opportunity and ability of the witness to see or hear or know the things  
11 testified to;

12 2. the witness's memory;

13 3. the witness's manner while testifying;

14 4. the witness's interest in the outcome of the case, if any;

15 5. the witness's bias or prejudice, if any;

16 6. whether other evidence contradicted the witness's testimony;

17 7. the reasonableness of the witness's testimony in light of all the evidence;

18 and

19 8. any other factors that bear on believability.

20 Sometimes a witness may say something that is not consistent with something  
21 else he or she said. Sometimes different witnesses will give different versions of  
22 what happened. People often forget things or make mistakes in what they remember.  
23 Also, two people may see the same event but remember it differently. You may  
24 consider these differences, but do not decide that testimony is untrue just because it  
25 differs from other testimony.

26 However, if you decide that a witness has deliberately testified untruthfully  
27 about something important, you may choose not to believe anything that witness

28

1 said. On the other hand, if you think the witness testified untruthfully about some  
2 things but told the truth about others, you may accept the part you think is true and  
3 ignore the rest.

4 The weight of the evidence as to a fact does not necessarily depend on the  
5 number of witnesses who testify. What is important is how believable the witnesses  
6 were, and how much weight you think their testimony deserves.

7  
8 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
9 Circuit No. 1.14, without change.

10  
11 PROPOSED BY: BOTH PLAINTIFFS AND  
12 DEFENDANT

13 GIVEN AS PROPOSED \_\_\_\_\_

14 GIVEN AS MODIFIED \_\_\_\_\_

15 GIVEN ON COURT'S OWN \_\_\_\_\_

16 MOTION

17 REFUSED \_\_\_\_\_

18 WITHDRAWN \_\_\_\_\_

19

20 **INSTRUCTION NO. 16**

21 **Conduct of the Jury**

22 I will now say a few words about your conduct as jurors.

23 First, keep an open mind throughout the trial, and do not decide what the  
24 verdict should be until you and your fellow jurors have completed your deliberations  
25 at the end of the case.

26 Second, because you must decide this case based only on the evidence  
27 received in the case and on my instructions as to the law that applies, you must not

28

1 be exposed to any other information about the case or to the issues it involves during  
2 the course of your jury duty. Thus, until the end of the case or unless I tell you  
3 otherwise:

4       Do not communicate with anyone in any way and do not let anyone else  
5 communicate with you in any way about the merits of the case or anything to do  
6 with it. This includes discussing the case in person, in writing, by phone or  
7 electronic means, via email, text messaging, or any internet chat room, blog, website  
8 or application, including but not limited to Facebook, YouTube, Twitter, Instagram,  
9 LinkedIn, Snapchat, or any other forms of social media. This applies to  
10 communicating with your fellow jurors until I give you the case for deliberation, and  
11 it applies to communicating with everyone else including your family members,  
12 your employer, the media or press, and the people involved in the trial, although you  
13 may notify your family and your employer that you have been seated as a juror in  
14 the case, and how long you expect the trial to last. But, if you are asked or  
15 approached in any way about your jury service or anything about this case, you must  
16 respond that you have been ordered not to discuss the matter and report the contact  
17 to the court.

18       Because you will receive all the evidence and legal instruction you properly  
19 may consider to return a verdict: do not read, watch or listen to any news or media  
20 accounts or commentary about the case or anything to do with it [although I have no  
21 information that there will be news reports about this case]; do not do any research,  
22 such as consulting dictionaries, searching the Internet, or using other reference  
23 materials; and do not make any investigation or in any other way try to learn about  
24 the case on your own. Do not visit or view any place discussed in this case, and do  
25 not use Internet programs or other devices to search for or view any place discussed  
26 during the trial. Also, do not do any research about this case, the law, or the people  
27 involved—including the parties, the witnesses or the lawyers—until you have been

1 excused as jurors. If you happen to read or hear anything touching on this case in the  
2 media, turn away and report it to me as soon as possible.

3       These rules protect each party's right to have this case decided only on  
4 evidence that has been presented here in court. Witnesses here in court take an oath  
5 to tell the truth, and the accuracy of their testimony is tested through the trial  
6 process. If you do any research or investigation outside the courtroom, or gain any  
7 information through improper communications, then your verdict may be influenced  
8 by inaccurate, incomplete or misleading information that has not been tested by the  
9 trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if  
10 you decide the case based on information not presented in court, you will have  
11 denied the parties a fair trial. Remember, you have taken an oath to follow the rules,  
12 and it is very important that you follow these rules.

13       A juror who violates these restrictions jeopardizes the fairness of these  
14 proceedings, **and a mistrial could result that would require the entire trial**  
**process to start over.** If any juror is exposed to any outside information, please  
16 notify the court immediately.

17  
18 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
19 Circuit No. 1.15.

20  
21 PROPOSED BY: BOTH PLAINTIFFS AND  
22 DEFENDANT

23 GIVEN AS PROPOSED \_\_\_\_\_

24 GIVEN AS MODIFIED \_\_\_\_\_

25 GIVEN ON COURT'S OWN \_\_\_\_\_

26 MOTION \_\_\_\_\_

27 REFUSED \_\_\_\_\_

1 WITHDRAWN \_\_\_\_\_  
2

3 **INSTRUCTION NO. 17**

4 **Publicity During Trial**

5 If there is any news media account or commentary about the case or anything to do  
6 with it, you must ignore it. You must not read, watch or listen to any news media  
7 account or commentary about the case or anything to do with it. The case must be  
8 decided by you solely and exclusively on the evidence that will be received in the  
9 case and on my instructions as to the law that applies. If any juror is exposed to any  
10 outside information, please notify me immediately.

11

12 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
13 Circuit No. 1.16, without change.

14

15 **PROPOSED BY: BOTH PLAINTIFFS AND**  
16 **DEFENDANT**

17 **GIVEN AS PROPOSED** \_\_\_\_\_

18 **GIVEN AS MODIFIED** \_\_\_\_\_

19 **GIVEN ON COURT'S OWN** \_\_\_\_\_

20 **MOTION**

21 **REFUSED** \_\_\_\_\_

22 **WITHDRAWN** \_\_\_\_\_

23

24 **INSTRUCTION NO. 18**

25 **Taking Notes**

26 If you wish, you may take notes to help you remember the evidence. If you do  
27 take notes, please keep them to yourself until you go to the jury room to decide the

28

1 case. Do not let notetaking distract you. When you leave, your notes should be left  
2 in the **envelope in the jury room**. No one will read your notes.

3 Whether or not you take notes, you should rely on your own memory of the  
4 evidence. Notes are only to assist your memory. You should not be overly  
5 influenced by your notes or those of other jurors.

6

7 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
8 Circuit No. 1.18.

9

10 PROPOSED BY: BOTH PLAINTIFFS AND

11 DEFENDANT

12 GIVEN AS PROPOSED \_\_\_\_\_

13 GIVEN AS MODIFIED \_\_\_\_\_

14 GIVEN ON COURT'S OWN \_\_\_\_\_

15 MOTION

16 REFUSED \_\_\_\_\_

17 WITHDRAWN \_\_\_\_\_

18

## 19 INSTRUCTION NO. 19

### 20 Bench Conferences and Recesses

21 From time to time during the trial, it **may become** necessary for me to talk  
22 with the attorneys out of the hearing of the jury, either by having a conference at the  
23 bench when the jury **is** present in the courtroom, or by calling a recess. Please  
24 understand that while you **are** waiting, we **are** working. The purpose of these  
25 conferences is not to keep relevant information from you, but to decide how certain  
26 evidence is to be treated under the rules of evidence and to avoid confusion and  
27 error.

28

1       Of course, we **will do** what we **can** to keep the number and length of these  
2 conferences to a minimum. I **may** not always grant an attorney's request for a  
3 conference. Do not consider my granting or denying a request for a conference as  
4 any indication of my opinion of the case or of what your verdict should be.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.20.

9 PROPOSED BY: BOTH PLAINTIFFS AND  
10 DEFENDANT

## 11 | GIVEN AS PROPOSED

## 12 | GIVEN AS MODIFIED

13 | GIVEN ON COURT'S OWN

14 | MOTION

15 | REFUSED

16 | WITHDRAWN

## **INSTRUCTION NO. 20**

## **Outline of Trial**

20 Trials proceed in the following way: First, each side may make an opening  
21 statement. An opening statement is not evidence. It is simply an outline to help you  
22 understand what that party expects the evidence will show. A party is not required to  
23 make an opening statement.

24 The plaintiffs will then present evidence, and counsel for the defendant may  
25 cross-examine. Then the defendant may present evidence, and counsel for the  
26 plaintiffs may cross-examine.

After the evidence has been presented, I will instruct you on the law that

1 applies to the case and the attorneys will make closing arguments.

2 After that, you will go to the jury room to deliberate on your verdict.

3  
4 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
5 Circuit No. 1.21.

6  
7 PROPOSED BY: BOTH PLAINTIFFS AND  
8 DEFENDANT

9 GIVEN AS PROPOSED \_\_\_\_\_

10 GIVEN AS MODIFIED \_\_\_\_\_

11 GIVEN ON COURT'S OWN \_\_\_\_\_

12 MOTION \_\_\_\_\_

13 REFUSED \_\_\_\_\_

14 WITHDRAWN \_\_\_\_\_

15  
16 **INSTRUCTION NO. 21**

17 **Stipulated Testimony**

18 The parties have agreed what [witness]’s testimony would be if called as a  
19 witness. You should consider that testimony in the same way as if it had been given  
20 here in court.

21  
22 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
23 Circuit No. 2.1, without change.

24  
25 PROPOSED BY: BOTH PLAINTIFFS AND  
26 DEFENDANT

27 GIVEN AS PROPOSED \_\_\_\_\_

1 GIVEN AS MODIFIED \_\_\_\_\_

2 GIVEN ON COURT'S OWN \_\_\_\_\_

3 MOTION

4 REFUSED \_\_\_\_\_

5 WITHDRAWN \_\_\_\_\_

6

7

8 **INSTRUCTION NO. 22**

9 **Stipulations of Fact**

10 The parties have agreed to certain facts [to be placed in evidence as Exhibit  
11 \_\_\_\_\_] [that will be read to you]. You must therefore treat these facts as having been  
12 proved.

13

14 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
15 Circuit No. 2.2, without change.

16

17 PROPOSED BY: BOTH PLAINTIFFS AND

18 DEFENDANT

19 GIVEN AS PROPOSED \_\_\_\_\_

20 GIVEN AS MODIFIED \_\_\_\_\_

21 GIVEN ON COURT'S OWN \_\_\_\_\_

22 MOTION

23 REFUSED \_\_\_\_\_

24 WITHDRAWN \_\_\_\_\_

25

26

27

28

## **INSTRUCTION NO. 23**

## Judicial Notice

The court has decided to accept as proved the fact that state fact. You must accept this fact as true.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.3, without change.

PROPOSED BY: BOTH PLAINTIFFS AND

**DEFENDANT**

**GIVEN AS PROPOSED**

**GIVEN AS MODIFIED**

## GIVEN ON COURT'S OWN

## MOTION

REFUSED

WITHDRAWN

## **INSTRUCTION NO. 24**

## **Deposition In Lieu of Live Testimony**

## Modified:

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

The deposition of [*name of witness*] was taken on [*date*]. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

1       Do not place any significance on the behavior or tone of voice of any person  
2 reading the questions or answers.  
3

4       **Original:**

5       A deposition is the sworn testimony of a witness taken before trial. The  
6 witness is placed under oath to tell the truth and lawyers for each party may ask  
7 questions. The questions and answers are recorded. When a person is unavailable  
8 to testify at trial, the deposition of that person may be used at the trial.

9       The deposition of [*name of witness*] was taken on [*date*]. Insofar as possible,  
10 you should consider deposition testimony, presented to you in court in lieu of live  
11 testimony, in the same way as if the witness had been present to testify.

12       Do not place any significance on the behavior or tone of voice of any person  
13 reading the questions or answers.  
14

15       **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
16 Circuit No. 2.4.  
17

18       PROPOSED BY: BOTH PLAINTIFFS AND

19       DEFENDANT

20       GIVEN AS PROPOSED

\_\_\_\_\_

21       GIVEN AS MODIFIED

\_\_\_\_\_

22       GIVEN ON COURT'S OWN

\_\_\_\_\_

23       MOTION

\_\_\_\_\_

24       REFUSED

\_\_\_\_\_

25       WITHDRAWN

\_\_\_\_\_

26

27

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## **INSTRUCTION NO. 25**

## **Impeachment Evidence - Witness**

The evidence that a witness has lied under oath on a prior occasion may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give the testimony of the witness and for no other purpose.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.9.

**PROPOSED BY: BOTH PLAINTIFFS AND  
DEFENDANT**

**GIVEN AS PROPOSED**

## GIVEN AS MODIFIED

GIVEN ON COURT'S OWN

## MOTION

**REFUSED** \_\_\_\_\_

**WITHDRAWN**

## **INSTRUCTION NO. 26**

## **Use of Interrogatories of a Party**

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

1  
2 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
3 Circuit No. 2.11, without change.  
4

5 PROPOSED BY: BOTH PLAINTIFFS AND  
6 DEFENDANT

7 GIVEN AS PROPOSED \_\_\_\_\_

8 GIVEN AS MODIFIED \_\_\_\_\_

9 GIVEN ON COURT'S OWN \_\_\_\_\_

10 MOTION

11 REFUSED \_\_\_\_\_

12 WITHDRAWN \_\_\_\_\_  
13

## 14 **INSTRUCTION NO. 27**

### 15 **Expert Opinion**

16 You [have heard] [are about to hear] testimony from [name] who [testified]  
17 [will testify] to opinions and the reasons for his opinions. This opinion testimony is  
18 allowed, because of the education or experience of this witness.

19 Such opinion testimony should be judged like any other testimony. You may  
20 accept it or reject it, and give it as much weight as you think it deserves, considering  
21 the witness's education and experience, the reasons given for the opinion, and all the  
22 other evidence in the case.

23  
24 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
25 Circuit No. 2.13, without change.  
26  
27  
28

1 PROPOSED BY: BOTH PLAINTIFFS AND  
2 DEFENDANT \_\_\_\_\_  
3 GIVEN AS PROPOSED \_\_\_\_\_  
4 GIVEN AS MODIFIED \_\_\_\_\_  
5 GIVEN ON COURT'S OWN \_\_\_\_\_  
6 MOTION \_\_\_\_\_  
7 REFUSED \_\_\_\_\_  
8 WITHDRAWN \_\_\_\_\_  
9

10 **INSTRUCTION NO. 28**

11 **Charts and Summaries Not Received in Evidence**

12 Certain charts and summaries not admitted into evidence [may be] [have  
13 been] shown to you in order to help explain the contents of books, records,  
14 documents, or other evidence in the case. Charts and summaries are only as good as  
15 the underlying evidence that supports them. You should, therefore, give them only  
16 such weight as you think the underlying evidence deserves.

17  
18 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
19 Circuit No. 2.14, without change.

20  
21 PROPOSED BY: BOTH PLAINTIFFS AND  
22 DEFENDANT \_\_\_\_\_  
23 GIVEN AS PROPOSED \_\_\_\_\_  
24 GIVEN AS MODIFIED \_\_\_\_\_  
25 GIVEN ON COURT'S OWN \_\_\_\_\_  
26 MOTION \_\_\_\_\_  
27 REFUSED \_\_\_\_\_  
28

1 WITHDRAWN \_\_\_\_\_  
2

3 **INSTRUCTION NO. 29**

4 **Charts and Summaries in Evidence**

5 Certain charts and summaries [may be] [have been] admitted into evidence to  
6 illustrate information brought out in the trial. Charts and summaries are only as  
7 good as the testimony or other admitted evidence that supports them. You should,  
8 therefore, give them only such weight as you think the underlying evidence  
9 deserves.

10

11 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
12 Circuit No. 2.15, without change.

13

14 PROPOSED BY: BOTH PLAINTIFFS AND  
15 DEFENDANT

16 GIVEN AS PROPOSED \_\_\_\_\_

17 GIVEN AS MODIFIED \_\_\_\_\_

18 GIVEN ON COURT'S OWN \_\_\_\_\_

19 MOTION

20 REFUSED \_\_\_\_\_

21 WITHDRAWN \_\_\_\_\_

22

23 **INSTRUCTION NO. 30**

24 **Evidence in Electronic Format**

25 Those exhibits received in evidence that are capable of being displayed  
26 electronically will be provided to you in that form, and you will be able to view  
27 them in the jury room. A computer, projector, printer and accessory equipment will

28

1 be available to you in the jury room.

2       A court technician will show you how to operate the computer and other  
3 equipment; how to locate and view the exhibits on the computer; and how to print  
4 the exhibits. You will also be provided with a paper list of all exhibits received in  
5 evidence. You may request a paper copy of any exhibit received in evidence by  
6 sending a note through the [clerk] [bailiff].) If you need additional equipment or  
7 supplies or if you have questions about how to operate the computer or other  
8 equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or  
9 by one or more members of the jury. Do not refer to or discuss any exhibit you  
10 were attempting to view.

11       If a technical problem or question requires hands-on maintenance or  
12 instruction, a court technician may enter the jury room with [the clerk] [the bailiff]  
13 present for the sole purpose of assuring that the only matter that is discussed is the  
14 technical problem. When the court technician or any nonjuror is in the jury room,  
15 the jury shall not deliberate. No juror may say anything to the court technician or  
16 any nonjuror other than to describe the technical problem or to seek information  
17 about operation of the equipment. Do not discuss any exhibit or any aspect of the  
18 case.

19       The sole purpose of providing the computer in the jury room is to enable  
20 jurors to view the exhibits received in evidence in this case. You may not use the  
21 computer for any other purpose. At my direction, technicians have taken steps to  
22 ensure that the computer does not permit access to the Internet or to any “outside”  
23 website, database, directory, game, or other material. Do not attempt to alter the  
24 computer to obtain access to such materials. If you discover that the computer  
25 provides or allows access to such materials, you must inform the court immediately  
26 and refrain from viewing such materials. Do not remove the computer or any  
27 electronic data from the jury room, and do not copy any such data.

1  
2 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
3 Circuit No. 2.16, without change.  
4

5 PROPOSED BY: BOTH PLAINTIFFS AND  
6 DEFENDANT

7 GIVEN AS PROPOSED \_\_\_\_\_

8 GIVEN AS MODIFIED \_\_\_\_\_

9 GIVEN ON COURT'S OWN \_\_\_\_\_

10 MOTION

11 REFUSED \_\_\_\_\_

12 WITHDRAWN \_\_\_\_\_  
13

#### 14 **INSTRUCTION NO. 31**

##### 15 **Duty to Deliberate**

16 Before you begin your deliberations, elect one member of the jury as your  
17 presiding juror. The presiding juror will preside over the deliberations and serve as  
18 the spokesperson for the jury in court.

19 You shall diligently strive to reach agreement with all of the other jurors if  
20 you can do so. Your verdict must be unanimous.

21 Each of you must decide the case for yourself, but you should do so only after  
22 you have considered all of the evidence, discussed it fully with the other jurors, and  
23 listened to their views.

24 It is important that you attempt to reach a unanimous verdict but, of course,  
25 only if each of you can do so after having made your own conscientious decision.  
26 Do not be unwilling to change your opinion if the discussion persuades you that you  
27 should. But do not come to a decision simply because other jurors think it is right,

1 or change an honest belief about the weight and effect of the evidence simply to  
2 reach a verdict.  
3

4 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
5 Circuit No. 3.1, without change.  
6

7 PROPOSED BY: BOTH PLAINTIFFS AND  
8 DEFENDANT

9 GIVEN AS PROPOSED \_\_\_\_\_

10 GIVEN AS MODIFIED \_\_\_\_\_

11 GIVEN ON COURT'S OWN \_\_\_\_\_

12 MOTION \_\_\_\_\_

13 REFUSED \_\_\_\_\_

14 WITHDRAWN \_\_\_\_\_  
15  
16

## 17 INSTRUCTION NO. 32

### 18 Communication with Court

19 If it becomes necessary during your deliberations to communicate with me,  
20 you may send a note through the [clerk] [bailiff], signed by any one or more of you.  
21 No member of the jury should ever attempt to communicate with me except by a  
22 signed writing. I will not communicate with any member of the jury on anything  
23 concerning the case except in writing or here in open court. If you send out a  
24 question, I will consult with the lawyers before answering it, which may take some  
25 time. You may continue your deliberations while waiting for the answer to any  
26 question. Remember that you are not to tell anyone—including the court—how the  
27 jury stands, whether in terms of vote count or otherwise, until after you have  
28

1 reached a unanimous verdict or have been discharged.  
2

3 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
4 Circuit No. 3.3, without change.  
5

6 PROPOSED BY: BOTH PLAINTIFFS AND

7 DEFENDANT

8 GIVEN AS PROPOSED \_\_\_\_\_

9 GIVEN AS MODIFIED \_\_\_\_\_

10 GIVEN ON COURT'S OWN \_\_\_\_\_

11 MOTION

12 REFUSED \_\_\_\_\_

13 WITHDRAWN \_\_\_\_\_  
14

### 15 INSTRUCTION NO. 33

#### 16 Return of Verdict Form

17 A verdict form has been prepared for you. [*Explain verdict form as needed.*]  
18 After you have reached unanimous agreement on a verdict, your presiding juror  
19 should complete the verdict form according to your deliberations, sign and date it,  
20 and advise the [clerk] [bailiff] that you are ready to return to the courtroom.  
21

22 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
23 Circuit No. 3.5.  
24

25 PROPOSED BY: BOTH PLAINTIFFS AND

26 DEFENDANT

27 GIVEN AS PROPOSED \_\_\_\_\_  
28

1 GIVEN AS MODIFIED \_\_\_\_\_

2 GIVEN ON COURT'S OWN \_\_\_\_\_

3 MOTION

4 REFUSED \_\_\_\_\_

5 WITHDRAWN \_\_\_\_\_

6

7 **INSTRUCTION NO. 34**

8 **Corporations – Fair Treatment**

9 **Modified:**

10 All parties are equal before the law and a corporation [partnership] is entitled  
11 to the same fair and conscientious consideration by you as any party.

12

13 **Original:**

14 All parties are equal before the law and a [corporation] [partnership] is  
15 entitled to the same fair and conscientious consideration by you as any party.

16

17 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
18 Circuit No. 4.1.

19

20 PROPOSED BY: BOTH PLAINTIFFS AND

21 DEFENDANT

22 GIVEN AS PROPOSED \_\_\_\_\_

23 GIVEN AS MODIFIED \_\_\_\_\_

24 GIVEN ON COURT'S OWN \_\_\_\_\_

25 MOTION

26 REFUSED \_\_\_\_\_

27 WITHDRAWN \_\_\_\_\_

28

## **INSTRUCTION NO. 35**

## **Liability of Corporations – Scope of Authority Not In Issue**

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, and directors performed within the scope of authority.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.2, without change.

PROPOSED BY: BOTH PLAINTIFFS AND

## DEFENDANT

**GIVEN AS PROPOSED**

**GIVEN AS MODIFIED**

## GIVEN ON COURT'S OWN

## MOTION

REFUSED

WITHDRAWN

## INSTRUCTION NO. 36

## Scope of Authority Defined

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

**Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.5, without change.

1  
2 PROPOSED BY: **PLAINTIFFS**  
3 **ONLY**  
4 GIVEN AS PROPOSED \_\_\_\_\_  
5 GIVEN AS MODIFIED \_\_\_\_\_  
6 GIVEN ON COURT'S OWN \_\_\_\_\_  
7 MOTION \_\_\_\_\_  
8 REFUSED \_\_\_\_\_  
9 WITHDRAWN \_\_\_\_\_  
10

11 **INSTRUCTION NO. 37**

12 **Independent Contractor – Definition**

13 An independent contractor is a person who performs services for another  
14 person under an express or implied agreement and who is not subject to the other's  
15 control or, or right to control, the manner and means of performing the services.

16 One who engages an independent contractor is not liable to others for the acts  
17 of omissions of the independent contractor.  
18

19 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
20 Circuit No. 4.14, without change.  
21

22 PROPOSED BY: **DEFENDANT**

23 **ONLY**  
24 GIVEN AS PROPOSED \_\_\_\_\_  
25 GIVEN AS MODIFIED \_\_\_\_\_  
26 GIVEN ON COURT'S OWN \_\_\_\_\_  
27 MOTION \_\_\_\_\_  
28

1 REFUSED \_\_\_\_\_

2 WITHDRAWN \_\_\_\_\_

3

#### 4 INSTRUCTION NO. 38

##### 5 Agent and Principal--Definition

6 An agent is a person who performs services for another person under an  
7 express or implied agreement and who is subject to the other's control or right to  
8 control the manner and means of performing the services. The other person is called  
9 a principal. **One may be an agent without receiving compensation for services.**

10 **The agency agreement may be oral or written.**

11

12 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
13 Circuit No. 4.4.

14

15 **PROPOSED BY: PLAINTIFFS**

16 **ONLY**

17 GIVEN AS PROPOSED \_\_\_\_\_

18 GIVEN AS MODIFIED \_\_\_\_\_

19 GIVEN ON COURT'S OWN \_\_\_\_\_

20 MOTION

21 REFUSED \_\_\_\_\_

22 WITHDRAWN \_\_\_\_\_

23

24

25

26

27

28

**INSTRUCTION NO. 39**

**PRINCIPAL SUED BUT NOT AGENT—**

**AGENCY OR AUTHORITY DENIED**

## Modified:

The defendant **Younique** is sued as a principal. The plaintiff claims that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique**'s agent. **Younique** [denies that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique**'s agent] [admits that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique**'s agent] [and] [denies that **Senos Marketing Limited and/or Six Plus Trade Company** was acting within the scope of authority.]

If you find that **Senos Marketing Limited and/or Six Plus Trade Company** [was the agent of **Younique** and] was acting within the scope of authority, then any act or omission of **Senos Marketing Limited and/or Six Plus Trade Company** was the act or omission of **Younique**.

If you find that **Senos Marketing Limited** and/or **Six Plus Trade Company** was not acting within the scope of authority as **Younique**'s agent, then you must find for **Younique**.

## Original:

The defendant [*name of alleged principal*] is sued as a principal. The plaintiff claims that [*name of alleged agent*] was acting as [*name of alleged principal*]’s agent. [*Name of alleged principal*] [denies that [*name of alleged agent*] was acting as [*name of alleged principal*]’s agent] [admits that [*name of alleged agent*] was acting as [*name of alleged principal*]’s agent] [and] [denies that [*name of alleged agent*] was acting as [*name of alleged principal*]’s agent]

1 agent] was acting within the scope of authority.]  
2

3 If you find that [name of alleged agent] [was the agent of [name of alleged  
4 principal] and] was acting within the scope of authority, then any act or omission of  
5 [name of alleged agent] was the act or omission of [name of alleged principal].  
6

7 If you find that [name of alleged agent] was not acting within the scope of  
8 authority as [name of alleged principal]'s agent, then you must find for [name of  
9 alleged principal].

10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
11 Circuit No. 4.12.  
12

13 PROPOSED BY: **PLAINTIFFS**

14 **ONLY**

15 GIVEN AS PROPOSED \_\_\_\_\_

16 GIVEN AS MODIFIED \_\_\_\_\_

17 GIVEN ON COURT'S OWN \_\_\_\_\_

18 MOTION \_\_\_\_\_

19 REFUSED \_\_\_\_\_

20 WITHDRAWN \_\_\_\_\_  
21

22 **INSTRUCTION NO. 40**

23 **Ratification**

24 A purported principal who ratifies the acts of someone who was purporting to  
25 act as the principal's agent will be liable for the acts of that purported agent,  
26 provided that the principal made a conscious and affirmative decision to approve the  
27 relevant acts of the purported agent while in possession of full and complete  
28

1 knowledge of all relevant events.

2

3 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
4 Circuit No. 4.7.

5

6 PROPOSED BY: **PLAINTIFFS** .

7 **ONLY**

8 GIVEN AS PROPOSED \_\_\_\_\_

9 GIVEN AS MODIFIED \_\_\_\_\_

10 GIVEN ON COURT'S OWN \_\_\_\_\_

11 MOTION

12 REFUSED \_\_\_\_\_

13 WITHDRAWN \_\_\_\_\_

14

15 **INSTRUCTION NO. 41**

16 **Act of Agent is Act of Principal**

17 Any act or omission of an agent within the scope of authority is the act or  
18 omission of the principal.

19

20 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
21 Circuit No. 4.8.

22

23 PROPOSED BY: **PLAINTIFFS**

24 **ONLY**

25 GIVEN AS PROPOSED \_\_\_\_\_

26 GIVEN AS MODIFIED \_\_\_\_\_

27

28

1 GIVEN ON COURT'S OWN \_\_\_\_\_  
2 MOTION \_\_\_\_\_  
3 REFUSED \_\_\_\_\_  
4 WITHDRAWN \_\_\_\_\_

## **INSTRUCTION NO. 42**

## Damages—Proof

#### **42.a Plaintiffs' Proposed Modified Instruction.**

10 It is the duty of the Court to instruct you about the measure of damages. By  
11 instructing you on damages, the Court does not mean to suggest for which party  
12 your verdict should be rendered.

If you find for the plaintiff **on their claims** you must determine the plaintiffs' damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

## **The testimony of the Plaintiffs**

## **The testimony of the Defendant**

## The expert reports

## **The evidence presented at trial**

22 Plaintiffs are seeking actual damages for themselves and the members of  
23 the Classes. Unless you conclude that the Moodstruck 3D Fiber Lashes are  
24 worthless, the measurement of damages is the difference between the \$29  
25 purchase price and what the value of the lashes actually is if the lashes are not  
26 “Natural Fibers” or “100% Natural Green Tea Fibers.”

**It is for you to determine what damages, if any, have been proved.**

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

**42.b Defendant's Proposed Modified Instruction.**

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs **on their claims** you must determine the plaintiffs' damages. The plaintiffs **have** the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiffs for any injury you find was caused by the defendant. You should consider the following:

**Plaintiff Schmitt seeks actual damages for herself. The measure of damages is the difference between what she paid for the Younique Moodstruck 3D Fiber Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as received if the lash component does not consist of “Natural Fibers” or “100% Natural Green Tea Fibers.”**

**Plaintiff Schmitt also brings this case on behalf of the California Class, and seeks actual damages on its behalf. The measure of damages is the difference between what the California Class paid for the Younique Moodstruck 3D Fiber Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as received if the lash component does not consist of “Natural Fibers” or “100% Natural Green Tea Fibers.”**

**Plaintiff Brun seeks actual damages for herself. The measure of damages is the difference between what she paid for the Younique Moodstruck 3D Fiber Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as received if the lash component does not consist of “Natural Fibers” or “100% Natural**

1 **Green Tea Fibers.”**

2 **Plaintiff Brun also brings this case on behalf of the Ohio Class, and seeks**  
3 **actual damages on its behalf. The measure of damages is the difference**  
4 **between what the Ohio Class paid for the Younique Moodstruck 3D Fiber**  
5 **Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as received**  
6 **if the lash component does not consist of “Natural Fibers” or “100% Natural**  
7 **Green Tea Fibers.”**

8 **Plaintiff Reilly seeks actual damages for herself. The measure of**  
9 **damages is the difference between what she paid for the Younique Moodstruck**  
10 **3D Fiber Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as**  
11 **received if the lash component does not consist of “Natural Fibers” or “100%**  
12 **Natural Green Tea Fibers.”**

13 **Plaintiff Reilly also brings this case on behalf of the Florida Class, and**  
14 **seeks actual damages on its behalf. The measure of damages is the difference**  
15 **between what the Florida Class paid for the Younique Moodstruck 3D Fiber**  
16 **Lashes and the value of the Younique Moodstruck 3D Fiber Lashes as received**  
17 **if the lash component does not consist of “Natural Fibers” or “100% Natural**  
18 **Green Tea Fibers.”**

19 **It is for you to determine what damages, if any, have been proved.**

20 Your award must be based upon evidence and not upon speculation,  
21 guesswork or conjecture.

22

23 **Original**

24 It is the duty of the Court to instruct you about the measure of damages. By  
25 instructing you on damages, the Court does not mean to suggest for which party  
26 your verdict should be rendered.

27 If you find for the plaintiff [on the plaintiff's [specify type of claim] claim],  
28

1 you must determine the plaintiff's damages. The plaintiff has the burden of proving  
2 damages by a preponderance of the evidence. Damages means the amount of money  
3 that will reasonably and fairly compensate the plaintiff for any injury you find was  
4 caused by the defendant. You should consider the following:

5 [Insert types of damages. See Instruction 5.2 (Measures of Types of  
6 Damages)]

7 It is for you to determine what damages, if any, have been proved.

8 Your award must be based upon evidence and not upon speculation,  
9 guesswork or conjecture.

10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
11 Circuit No. 5.1.  
12

13 PROPOSED BY: .  
14 GIVEN AS PROPOSED \_\_\_\_\_  
15 GIVEN AS MODIFIED \_\_\_\_\_  
16 GIVEN ON COURT'S OWN \_\_\_\_\_  
17 MOTION \_\_\_\_\_  
18 REFUSED \_\_\_\_\_  
19 WITHDRAWN \_\_\_\_\_  
20

21 **INSTRUCTION NO. 43**

22 **Punitive Damages**

23 **43.a Plaintiffs' Proposed Modified Instruction.**

24 If you find for the plaintiffs, you may, but are not required to, award punitive  
25 damages. The purposes of punitive damages are to punish a defendant and to deter  
26 similar acts in the future. Punitive damages may not be awarded to compensate a  
27 plaintiff.  
28

1       The plaintiffs **have** the burden of proving by **clear and convincing evidence**  
2 that punitive damages should be awarded and, if so, the amount of any such  
3 damages.

4       You may award punitive damages only if you find that the defendant's  
5 conduct that harmed the plaintiffs was malicious, oppressive or in reckless disregard  
6 of the plaintiffs' rights. Conduct is malicious if it is accompanied by ill will, or  
7 spite, or if it is for the purpose of injuring the plaintiffs. Conduct is in reckless  
8 disregard of the plaintiffs' rights if, under the circumstances, it reflects complete  
9 indifference to the plaintiffs' safety or rights, or if the defendant acts in the face of a  
10 perceived risk that its actions will violate the plaintiffs' rights under federal law. An  
11 act or omission is oppressive if the defendant injures or damages or otherwise  
12 violates the rights of the plaintiffs with unnecessary harshness or severity, such as  
13 by misusing or abusing authority or power or by taking advantage of some weakness  
14 or disability or misfortune of the plaintiffs.

15      If you find that punitive damages are appropriate, you must use reason in  
16 setting the amount. Punitive damages, if any, should be in an amount sufficient to  
17 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any  
18 party. In considering the amount of any punitive damages, consider the degree of  
19 reprehensibility of the defendant's conduct including whether the conduct that  
20 harmed the plaintiffs was particularly reprehensible because it also caused actual  
21 harm or posed a substantial risk of harm to people who are not parties to this case.  
22 You may not, however, set the amount of any punitive damages in order to punish  
23 the defendant for harm to anyone other than the plaintiffs in this case.

24

25      **43.b Defendant's Proposed Modified Instruction.**

26      If you find for the plaintiffs, you may, but are not required to, award punitive  
27 damages. The purposes of punitive damages are to punish a defendant and to deter

1 similar acts in the future. Punitive damages may not be awarded to compensate a  
2 plaintiff.

3 The plaintiffs **have** the burden of proving by **clear and convincing evidence**  
4 that punitive damages should be awarded and, if so, the amount of any such  
5 damages. **In order to recover punitive damages from a corporation, the**  
6 **wrongful conduct must have been committed, authorized or ratified by an**  
7 **officer, director, or managing agent of the corporation.**

8 You may award punitive damages only if you find that the defendant's  
9 conduct that harmed the plaintiffs was malicious, oppressive or in reckless disregard  
10 of the plaintiffs' rights. Conduct is malicious if it is accompanied by ill will, or  
11 spite, or if it is for the purpose of injuring the plaintiffs. Conduct is in reckless  
12 disregard of the plaintiffs' rights if, under the circumstances, it reflects complete  
13 indifference to the plaintiffs' safety or rights, or if the defendant acts in the face of a  
14 perceived risk that its actions will violate the plaintiffs' rights under federal law. An  
15 act or omission is oppressive if the defendant injures or damages or otherwise  
16 violates the rights of the plaintiffs with unnecessary harshness or severity, such as  
17 by misusing or abusing authority or power or by taking advantage of some weakness  
18 or disability or misfortune of the plaintiffs.

19 If you find that punitive damages are appropriate, you must use reason in  
20 setting the amount. Punitive damages, if any, should be in an amount sufficient to  
21 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any  
22 party. In considering the amount of any punitive damages, consider the degree of  
23 reprehensibility of the defendant's conduct including whether the conduct that  
24 harmed the plaintiffs was particularly reprehensible because it also caused actual  
25 harm or posed a substantial risk of harm to people who are not parties to this case.  
26 You may not, however, set the amount of any punitive damages in order to punish  
27 the defendant for harm to anyone other than the plaintiffs in this case.

**Original:**

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

The plaintiff has the burden of proving by [a preponderance of the evidence] [clear and convincing evidence] that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the defendant's conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct [, including whether the conduct that harmed the plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish

1 the defendant for harm to anyone other than the plaintiff in this case].

2 [In addition, you may consider the relationship of any award of punitive  
3 damages to any actual harm inflicted on the plaintiff.]

4 [Punitive damages may not be awarded against [specify defendant.] [You may  
5 impose punitive damages against one or more of the defendants and not others, and  
6 may award different amounts against different defendants.] [Punitive damages may  
7 be awarded even if you award plaintiff only nominal, and not compensatory,  
8 damages.]

9 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth  
10 Circuit No. 5.5; Cal. Civ. Code § 3294; and *Hardt v. Chrysler Group LLC*, 2015  
11 U.S. Dist. LEXIS 187386, \*28-29 (C.D. Cal. June 15, 2015).

12

13 PROPOSED BY: \_\_\_\_\_  
14 GIVEN AS PROPOSED \_\_\_\_\_  
15 GIVEN AS MODIFIED \_\_\_\_\_  
16 GIVEN ON COURT'S OWN \_\_\_\_\_  
17 MOTION \_\_\_\_\_  
18 REFUSED \_\_\_\_\_  
19 WITHDRAWN \_\_\_\_\_  
20

21 **INSTRUCTION NO. [XX]**

22 **Burden of Proof—Clear and Convincing Evidence**

23 Plaintiffs believe that since the trial is bifurcated as to damages that this  
24 instruction should appear in this order as opposed to its current position at  
25 instruction number 5.

26

27

28

## **INSTRUCTION NO. 44**

## **Arguments of Counsel not Evidence of Damages**

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

**Source:** Judicial Council of California Civil Jury Instructions No. 3925, without change.

9 PROPOSED BY: BOTH PLAINTIFFS AND  
10 DEFENDANT

## 11 | GIVEN AS PROPOSED \_\_\_\_\_

## 12 | GIVEN AS MODIFIED

---

## 13 | GIVEN ON COURT'S OWN

14 | MOTION

15 | REFUSED \_\_\_\_\_

16 | WITHDRAWN

## **INSTRUCTION NO. 45**

## **Experts - Questions Containing Assumed Facts**

20 The law allows expert witnesses to be asked questions that are based on  
21 assumed facts. These are sometimes called “hypothetical questions.”

In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider whether the assumed facts are true.

25 | **Source:** Judicial Council of California Civil Jury Instructions No. 220, without  
26 | change.

1  
2 PROPOSED BY: BOTH PLAINTIFFS AND  
3 DEFENDANT \_\_\_\_\_  
4 GIVEN AS PROPOSED \_\_\_\_\_  
5 GIVEN AS MODIFIED \_\_\_\_\_  
6 GIVEN ON COURT'S OWN \_\_\_\_\_  
7 MOTION \_\_\_\_\_  
8 REFUSED \_\_\_\_\_  
9 WITHDRAWN \_\_\_\_\_  
10

#### 11 INSTRUCTION NO. 46

12 Consumers Legal Remedies Act- Essential Factual Elements (Civ. Code,  
13 § 1770)

##### 14 **46.a Plaintiffs' Proposed Modified Instruction.**

15 **Megan Schmitt** claims that **Younique** engaged in unfair methods of  
16 competition and unfair or deceptive acts or practices in a transaction that resulted, or  
17 ~~was intended to result~~, in the sale or lease of goods or services to a consumer, and  
18 that **she was** harmed by **Younique's** violation. To establish this claim, **Megan**  
19 **Schmitt** must prove all of the following:

20 1. That **Schmitt** acquired, ~~or sought to acquire, by purchase or lease,~~  
21 **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household  
22 purposes;

23 2. That **Younique** represented that **Younique Moodstruck 3D Fiber Lashes**  
24 contained “Natural Fibers” or “100% Natural Green Tea Fibers” when they  
25 did not, or that **Younique** advertised the **Younique Moodstruck 3D Fiber**  
26 **Lashes as containing “Natural Fibers” or “100% Natural Green Tea Fibers”**  
27 **with the intent not to sell them as advertised;**

**3. That Megan Schmitt and the members of the California Class were harmed; and**

4. That the harm to **Megan Schmitt** and the members of the California Class resulted from Younique's conduct.

The harm to **Megan Schmitt** and the members of the California Class resulted from **Younique's** conduct if **Megan Schmitt** relied on **Younique's** representation that **the lashes were made of “Natural Fibers” or “100% Natural Green Tea Fibers.”**

To prove reliance, **Megan Schmitt** need only prove that the representation was a substantial factor in **her** decision. **She** does not need to prove that it was the primary factor or the only factor in the decision.

If Younique's representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease **the Younique Moodstruck 3D Fiber Lashes**.

#### **46.b Defendant's Proposed Modified Instruction.**

## **For Plaintiff Schmitt**

**Plaintiff Schmitt** claims that **Younique** engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that **she was** harmed by **Younique**'s violation. To establish this claim, **Plaintiff Schmitt** must prove all of the following:

1. That Schmitt acquired, or sought to acquire, by purchase or lease, **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household purposes;

## 2. That Younique represented that Younique Moodstruck 3D Fiber Lashes

1 contained “Natural Fibers” or “100% Natural Green Tea Fibers” when they  
2 did not, or that Younique advertised the Younique Moodstruck 3D Fiber  
3 Lashes as containing “Natural Fibers” or “100% Natural Green Tea Fibers”  
4 with the intent not to sell them as advertised;

5 3. That **Schmitt** was harmed; and

6 4. That the harm to **Schmitt** resulted from **Younique’s** conduct.

7 **Schmitt’s** harm resulted from **Younique’s** conduct if **Schmitt** relied on  
8 **Younique’s** representation that **the lashes were made of “Natural Fibers” or**  
9 **“100% Natural Green Tea Fibers.”** To prove reliance, **Schmitt** need only prove  
10 that the representation was a substantial factor in **her** decision. **She** does not need to  
11 prove that it was the primary factor or the only factor in the decision.

12 If **Younique’s** representation of fact was material, reliance may be inferred. A  
13 fact is material if a reasonable consumer would consider it important in deciding  
14 whether to buy ~~or lease~~ **the Younique Moodstruck 3D Fiber Lashes.**

15

16 **For the California Class**

17 **Plaintiff Schmitt** claims that **Younique** engaged in unfair methods of  
18 competition and unfair or deceptive acts or practices in a transaction that resulted,~~or~~  
19 ~~was intended to result~~, in the sale ~~or~~ lease of goods ~~or~~ services to a consumer, and  
20 that **the California Class was** harmed by **Younique’s** violation. To establish this  
21 claim, **Plaintiff Schmitt** must prove all of the following:

22 1. That **the California Class** acquired,~~or sought to acquire~~, by purchase ~~or~~  
23 lease, **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household  
24 purposes;

25 2. That **Younique** represented that **Younique Moodstruck 3D Fiber Lashes**  
26 contained “Natural Fibers” or “100% Natural Green Tea Fibers” when they  
27 did not, or that Younique advertised the Younique Moodstruck 3D Fiber

**Lashes as containing “Natural Fibers” or “100% Natural Green Tea Fibers” with the intent not to sell them as advertised;**

3. That **the California Class** was harmed; and
4. That the harm to **the California Class** resulted from **Younique's** conduct.

**The California Class' harm resulted from Younique's conduct if the**

**California Class** relied on Younique's representation that the lashes were made of "Natural Fibers" or "100% Natural Green Tea Fibers." To prove reliance, Schmitt on behalf of the California Class need only prove that the representation was a substantial factor in the purchasing decisions of the California Class. She does not need to prove that it was the primary factor or the only factor in the decision.

If Younique's representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease **the Younique Moodstruck 3D Fiber Lashes.**

**Original:**

[Name of plaintiff] claims that [name of defendant] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [name of plaintiff] was harmed by [name of defendant]'s violation. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] acquired, or sought to acquire, by purchase or lease, [specify product or service] for personal, family, or household purposes;
2. That [name of defendant] [specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have];
3. That [name of plaintiff] was harmed; and
4. That [name of plaintiff]'s harm resulted from [name of defendant]'s

1 conduct.

2 [[Name of plaintiff]’s harm resulted from [name of defendant]’s conduct if  
3 [name of plaintiff] relied on [name of defendant]’s representation. To prove  
4 reliance, [name of plaintiff] need only prove that the representation was a substantial  
5 factor in [his/her] decision. [He/She] does not need to prove that it was the primary  
6 factor or the only factor in the decision.

7 If [name of defendant]’s representation of fact was material, reliance may be  
8 inferred. A fact is material if a reasonable consumer would consider it important in  
9 deciding whether to buy or lease the [goods/services].]

10 **Source:** Judicial Council of California Civil Jury Instructions No. 4700.

11

12 PROPOSED BY:

13 GIVEN AS PROPOSED \_\_\_\_\_

14 GIVEN AS MODIFIED \_\_\_\_\_

15 GIVEN ON COURT’S OWN \_\_\_\_\_

16 MOTION

17 REFUSED \_\_\_\_\_

18 WITHDRAWN \_\_\_\_\_

19

20 **INSTRUCTION NO. 47**

21 **Consumers Legal Remedies Act: Damages – For Plaintiff Schmitt**

22 Under California’s Consumers Remedies Act, the measure of actual damages  
23 is the difference between what Plaintiff Schmitt paid and the value of the Younique  
24 Moodstruck 3D Fiber Lashes that she received.

25

26 **Source:** *Chowning v. Kohl's Dep't Stores, Inc.*, 735 Fed. Appx. 924, 924-25, n. 1  
27 (2018) (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663 (2006)).

28

1  
2 PROPOSED BY: **DEFENDANT**  
3 **ONLY**  
4 GIVEN AS PROPOSED \_\_\_\_\_  
5 GIVEN AS MODIFIED \_\_\_\_\_  
6 GIVEN ON COURT'S OWN \_\_\_\_\_  
7 MOTION \_\_\_\_\_  
8 REFUSED \_\_\_\_\_  
9 WITHDRAWN \_\_\_\_\_  
10

#### 11 INSTRUCTION NO. 48

##### 12 Consumers Legal Remedies Act: Damages – For California Class

13 Under California's Consumers Remedies Act, the measure of actual damages  
14 is the difference between what the California Class paid and the value of the  
15 Younique Moodstruck 3D Fiber Lashes that was received.

16  
17 **Source:** *Chowning v. Kohl's Dep't Stores, Inc.*, 735 Fed. Appx. 924, 924-25, n. 1  
18 (2018) (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663 (2006)).

19  
20 PROPOSED BY: **DEFENDANT**  
21 **ONLY**  
22 GIVEN AS PROPOSED \_\_\_\_\_  
23 GIVEN AS MODIFIED \_\_\_\_\_  
24 GIVEN ON COURT'S OWN \_\_\_\_\_  
25 MOTION \_\_\_\_\_  
26 REFUSED \_\_\_\_\_  
27 WITHDRAWN \_\_\_\_\_  
28

## **INSTRUCTION NO. 49**

## **Ohio Implied Warranty**

**49.a Plaintiffs' Proposed Modified Instruction.**

MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty is implied that the goods will be merchantable. You will decide whether the goods were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber Lashes** must conform to the promises or affirmations of fact made on the container or label, in this case, that **the fibers were “Natural Fibers” or “100% Natural Green Tea Fibers.”**

**49.b Defendant's Proposed Modified Instruction.**

12 | For Plaintiff Brun

13 MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty  
14 is implied that the goods will be merchantable. You will decide whether the goods  
15 were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber**  
16 **Lashes** must conform to the promises or affirmations of fact made on the container  
17 or label, in this case, that **the fibers were “Natural Fibers” or “100% Natural**  
18 **Green Tea Fibers.”**

19 | For the Ohio Class

MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty is implied that the goods will be merchantable. You will decide whether the goods were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber Lashes** must conform to the promises or affirmations of fact made on the container or label, in this case, that **the fibers were “Natural Fibers” or “100% Natural Green Tea Fibers.”**

## Original:

1 MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty  
2 is implied that the goods will be merchantable. You will decide whether the goods  
3 were merchantable. To be merchantable, the goods must conform to the promises or  
4 affirmations of fact made on the container or label, if any.

5

6 Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.13.

7

8 PROPOSED BY: \_\_\_\_\_  
9 GIVEN AS PROPOSED \_\_\_\_\_  
10 GIVEN AS MODIFIED \_\_\_\_\_  
11 GIVEN ON COURT'S OWN \_\_\_\_\_  
12 MOTION \_\_\_\_\_  
13 REFUSED \_\_\_\_\_  
14 WITHDRAWN \_\_\_\_\_

15

16 **INSTRUCTION NO. 50**

17 **Ohio Express Warranty**

18

**50.a Plaintiffs' Proposed Modified Instruction.**

19

1. INTRODUCTION. There are two types of warranties that may accompany  
20 a sale of goods: the first is the express warranty, arising from the agreed terms of the  
21 sale; the second is the implied warranty, arising only from the fact that a sale was  
22 made. Both may exist in the same sale. If the seller [here, Younique] defaults under  
23 either type of warranty, the buyer [here, Plaintiff Brun] has remedies which will be  
24 discussed later.

25

2. FORMATION OF EXPRESS WARRANTY. If you find that (a) **Younique**  
26 **made an affirmation of fact that the lashes were made of “Natural Fibers and/or**  
27 **“100% Natural Green Tea Fibers”** and (b) that **affirmation of fact** became a part

28

1 of the basis of the bargain between the parties, then the agreement contains an express  
2 warranty that the goods will conform to the **affirmation of fact**.

3       3. PROMISE OR AFFIRMATION OF FACT. **Younique** has made an  
4 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%  
5 Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find  
6 that a reasonable person in the position of the buyer would believe that the seller had  
7 made an affirmation of fact about the goods.

8       4. BASIS OF THE BARGAIN. It is not necessary that the promise or  
9 affirmation be the motivating factor of the sale or be relied upon by the buyer; it is  
10 sufficient if the **affirmation of fact** is one of the bases of the bargain. If you find,  
11 however, that the buyer did rely on the **affirmation of fact**, the **affirmation of fact**  
12 would then be part of the basis of the bargain.

13

14       **50.b Defendant’s Proposed Modified Instruction.**

15       **For Plaintiff Brun**

16       INTRODUCTION. There are two types of warranties that may accompany a  
17 sale of goods: the first is the express warranty, arising from the agreed terms of the  
18 sale; the second is the implied warranty, arising only from the fact that a sale was  
19 made. Both may exist in the same sale. If the seller [here, **Younique**] defaults under  
20 either type of warranty, the buyer [here, **Plaintiff Brun**] has remedies which will be  
21 discussed later.

22       FORMATION OF EXPRESS WARRANTY. If you find that (a) **Younique**  
23 **made an affirmation of fact that the lashes were made of “Natural Fibers and/or  
24 “100% Natural Green Tea Fibers”** and (b) that **affirmation of fact** became a part  
25 of the basis of the bargain between the parties, then the agreement contains an express  
26 warranty that the goods will conform to the **affirmation of fact**.

27       PROMISE OR AFFIRMATION OF FACT. **Younique** has made an  
28

1 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%  
2 Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find  
3 that a reasonable person in the position of **Plaintiff Brun** would believe that  
4 **Younique** had made an affirmation of fact about the goods.

5 **BASIS OF THE BARGAIN.** It is not necessary that the promise or affirmation  
6 be the motivating factor of the sale or be relied upon by **Plaintiff Brun**; it is sufficient  
7 if the **affirmation of fact** is one of the bases of the bargain. If you find, however, that  
8 **Plaintiff Brun** did rely on the **affirmation of fact**, the **affirmation of fact** would then  
9 be part of the basis of the bargain.

10

11 **For Ohio Class**

12 **INTRODUCTION.** There are two types of warranties that may accompany a  
13 sale of goods: the first is the express warranty, arising from the agreed terms of the  
14 sale; the second is the implied warranty, arising only from the fact that a sale was  
15 made. Both may exist in the same sale. If the seller [**here, Younique**] defaults under  
16 either type of warranty, the buyer [**here, the Ohio Class**] has remedies which will be  
17 discussed later.

18 **FORMATION OF EXPRESS WARRANTY.** If you find that (a) **Younique**  
19 **made an affirmation of fact that the lashes were made of “Natural Fibers and/or  
20 “100% Natural Green Tea Fibers”** and (b) that **affirmation of fact** became a part  
21 of the basis of the bargain between the parties, then the agreement contains an express  
22 warranty that the goods will conform to the **affirmation of fact**.

23 **PROMISE OR AFFIRMATION OF FACT.** **Younique** has made an  
24 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%  
25 Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find  
26 that a reasonable person in the position of the **Ohio Class** would believe that  
27 **Younique** had made an affirmation of fact about the goods.

28

1           **BASIS OF THE BARGAIN.** It is not necessary that the promise or affirmation  
2 be the motivating factor of the sale or be relied upon by the **Ohio Class**; it is sufficient  
3 if the **affirmation of fact** is one of the bases of the bargain. If you find, however, that  
4 the **Ohio Clas** did rely on the **affirmation of fact**, the **affirmation of fact** would then  
5 be part of the basis of the bargain.

6

7 **Original:**

8 1. INTRODUCTION. There are two types of warranties that may accompany a sale  
9 of goods: the first is the express warranty, arising from the agreed terms of the sale;  
10 the second is the implied warranty, arising only from the fact that a sale was made.  
11 Both may exist in the same sale. If the seller defaults under either type of warranty,  
12 the buyer has remedies which will be discussed later.

13 2. FORMATION OF EXPRESS WARRANTY. If you find that (a) a (promise)  
14 (affirmation of fact) was made by the (seller) (the seller's representative) and (b) the  
15 (promise) (affirmation of fact) became a part of the basis of the bargain between the  
16 parties, then the agreement contains an express warranty that the goods will conform  
17 to the (promise) (affirmation of fact).

18 3. PROMISE OR AFFIRMATION OF FACT. The seller has made a (promise)  
19 (affirmation of fact) if, from the facts and circumstances in evidence, you find that a  
20 reasonable person in the position of the buyer would believe that the seller had made  
21 (a promise) (affirmation of fact) about the goods.

22 4. BASIS OF THE BARGAIN. It is not necessary that the promise or affirmation  
23 be the motivating factor of the sale or be relied upon by the buyer; it is sufficient if  
24 the (promise) (affirmation of fact) is one of the bases of the bargain. If you find,  
25 however, that the buyer did rely on the (promise) (affirmation of fact), the (promise)  
26 (affirmation of fact) would then be part of the basis of the bargain.

27

28

1 Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.11.

2

3 PROPOSED BY: .

4 GIVEN AS PROPOSED \_\_\_\_\_

5 GIVEN AS MODIFIED \_\_\_\_\_

6 GIVEN ON COURT'S OWN \_\_\_\_\_

7 MOTION

8 REFUSED \_\_\_\_\_

9 WITHDRAWN \_\_\_\_\_

10

## 11 INSTRUCTION NO. 51

### 12 Ohio Buyer's Damages for Breach Of Warranty of Accepted Goods

#### 13 51.a Plaintiffs' Proposed Modified Instruction.

14 GENERAL. If you find that the seller breached a warranty and the buyer  
15 accepted the goods, the buyer is entitled to the difference between the value of the  
16 goods at the time and place the buyer accepted them and the value they would have  
17 had if they had been as the seller warranted. To measure these damages you first must  
18 determine the value of the goods as warranted. Then subtract the value of the goods  
19 as accepted. The difference is the seller's damages.

20

#### 21 51.b Defendant's Proposed Modified Instruction.

#### 22 For Plaintiff Brun

23 GENERAL. If you find that **Younique** breached a warranty and **Plaintiff**  
24 **Brun** accepted the goods, **Plaintiff Brun** is entitled to the difference between the  
25 value of the goods at the time and place **she** accepted them and the value they would  
26 have had if they had been as **Younique** warranted. To measure these damages you  
27 first must determine the value of the goods as warranted. Then subtract the value of

28

1 the goods as accepted. The difference is **Plaintiff Brun's** damages.  
2

3           **For Ohio Class**

4 GENERAL. If you find that **Younique** breached a warranty and the **Ohio Class**  
5 accepted the goods, the **Ohio Class** is entitled to the difference between the value of  
6 the goods at the time and place **the Ohio Class** accepted them and the value they  
7 would have had if they had been as **Younique** warranted. To measure these  
8 damages you first must determine the value of the goods as warranted. Then subtract  
9 the value of the goods as accepted. The difference is **the Ohio Class'** damages.

10

11           **Original:**

12           GENERAL. If you find that the seller breached a warranty and the buyer  
13 accepted the goods, the buyer is entitled to the difference between the value of the  
14 goods at the time and place the buyer accepted them and the value they would have  
15 had if they had been as the seller warranted. To measure these damages you first  
16 must determine the value of the goods as warranted. Then subtract the value of the  
17 goods as accepted. The difference is the seller's damages.

18 Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.45.

19

20 PROPOSED BY: \_\_\_\_\_

21 GIVEN AS PROPOSED \_\_\_\_\_

22 GIVEN AS MODIFIED \_\_\_\_\_

23 GIVEN ON COURT'S OWN \_\_\_\_\_

24 MOTION \_\_\_\_\_

25 REFUSED \_\_\_\_\_

26 WITHDRAWN \_\_\_\_\_

27

28

## **INSTRUCTION NO. 52**

## Magnuson-Moss Warranty Claims

**52.a Plaintiffs' Proposed Modified Instruction.**

The Magnusson-Moss Act is a federal warranty law that adopts the law of the state in which the transaction occurred, in this case, Ohio. If you find that **Younique** breached either its express or implied warranties to **Plaintiff Stephanie Miller Brun** and the Ohio Class, then you must find that **Younique** also breached the Magnusson-Moss Warranty Act.

### **52.b Defendant's Proposed Modified Instruction.**

## **For Plaintiff Brun**

The Magnusson-Moss Act is a federal warranty law that adopts the law of the state in which the transaction occurred, in this case, Ohio. If you find that **Younique** breached either its express or implied warranties to **Plaintiff Brun**, then you must find that **Younique** also breached the Magnusson-Moss Warranty Act.

## For Ohio Class

The Magnusson-Moss Act is a federal warranty law that adopts the law of the state in which the transaction occurred, in this case, Ohio. If you find that **Younique** breached either its express or implied warranties to **the Ohio Class**, then you must find that **Younique** also breached the Magnusson-Moss Warranty Act.

Source: *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008); Doc. 136 Order on Summary Judgment at page 14.

**PROPOSED BY:**

**GIVEN AS PROPOSED**

**GIVEN AS MODIFIED**

1 GIVEN ON COURT'S OWN \_\_\_\_\_  
2 MOTION \_\_\_\_\_  
3 REFUSED \_\_\_\_\_  
4 WITHDRAWN \_\_\_\_\_  
5

6 **INSTRUCTION NO. 53**

7 **Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) Elements**

8 **53.a Plaintiffs’ Proposed Modified Instruction.**

9 Plaintiff Deana Reilly, on behalf of the Florida Class, claims that Younique is  
10 liable to her and the Florida Class for money damages for unfair and deceptive trade  
11 practices. To recover damages, Plaintiff must show by the greater weight of the  
12 evidence that:

13 (1) Defendant stated that the Younique Moodstruck 3D Fiber Lashes were  
14 “Natural Fibers” and “100% Natural Green Tea Fibers” when the lashes were  
15 neither;

16 (2) Defendant’s conduct has violated the Florida Deceptive and Unfair  
17 Trade Practices Act. The intent to deceive, or proof that anyone was actually  
18 deceived, is not necessary. The Florida Deceptive and Unfair Trade Practices Act  
19 is a statute designed to protect the consuming public and legitimate business  
20 enterprises from those who engage in unfair or deceptive acts or practices in the  
21 course of trade or commerce. Under that law it is enough that that Younique’s  
22 alleged misrepresentation had the capacity to deceive a reasonable consumer acting  
23 reasonably under the circumstances<sup>3</sup>. A “reasonable person” does not refer to the

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24 <sup>3</sup> *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception  
25 occurs if there is a “representation, omission, or practice that is likely to mislead the consumer  
26 acting reasonably in the circumstances, to the consumer’s detriment”) (quoting *Millenium  
27 Comm’ns & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA  
2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at \*3 (S.D. Fla.  
28 Sept. 13, 2013) (“[T]he Eleventh Circuit has held that the element of causation is met when the  
alleged misrepresentations would have deceived an objectively reasonable person.”) (citing

1 Plaintiff or any particular member of the Class. It is a reasonable person in the same  
2 position as Plaintiff and the Class<sup>4</sup>. An act need not violate a specific rule or  
3 regulation to be considered deceptive<sup>5</sup>.

4 (3) Defendant's conduct offends established public policy, or was immoral,  
5 unethical, oppressive, or unscrupulous, or was substantially injurious to Plaintiff.  
6

7 **53.b Defendant's Proposed Modified Instruction.**

8 **For Plaintiff Reilly**

9 Plaintiff **Reilly** claims that **Younique** is liable to **her** for money damages for  
10 unfair and deceptive trade practices. To recover damages, Plaintiff **Reilly** must  
11 show by the greater weight of the evidence that:

12 (1) Defendant stated that the **Younique Moodstruck 3D Fiber Lashes**  
13 **were “Natural Fibers” and “100% Natural Green Tea Fibers” when the lashes**  
14 **were actually just ground up nylon;**

15 (2) Defendant's conduct has violated the **Florida Deceptive and Unfair**  
16 **Trade Practices Act. The intent to deceive, or proof that anyone was actually**  
17 **deceived, is not necessary. The Florida Deceptive and Unfair Trade Practices**  
18 **Act is a statute designed to protect the consuming public and legitimate**  
19 **business enterprises from those who engage in unfair or deceptive acts or**  
20 **practices in the course of trade or commerce. Under that law it is enough that**

21  
22 

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*Fitzpatrick., 635 F.3d at 1283).*

23 <sup>4</sup> *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)  
24 (“[M]embers of a class proceeding . . . need not individually prove reliance on the alleged  
misrepresentations. It is sufficient if the class can establish that a reasonable person would have  
relied on the representations.”); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.  
25 4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the  
reasonable-person standard).

26 <sup>5</sup> “[A]n act does not need to violate a specific rule or regulation in order to be considered  
27 deceptive.” *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of*  
*Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So.2d 22, 24 (Fla. 4th DCA 1994)).  
28

1 **that Younique's alleged misrepresentation had the capacity to deceive a**  
2 **reasonable consumer acting reasonably under the circumstances<sup>6</sup>.** A  
3 **"reasonable person" does not refer to the Plaintiff. It is a reasonable person in**  
4 **the same position as Plaintiff<sup>7</sup>. An act need not violate a specific rule or**  
5 **regulation to be considered deceptive<sup>8</sup>.**

6 (3) Defendant's conduct offends established public policy, or was immoral,  
7 unethical, oppressive, or unscrupulous, or was substantially injurious to Plaintiff  
8 **Reilly.**

9  
10 **For Florida Class**

11 Plaintiff **Deana Reilly, on behalf of the Florida Class**, claims that **Younique**  
12 is liable to **the Florida Class** for money damages for unfair and deceptive trade  
13 practices. To recover damages, Plaintiff **Reilly** must show **on behalf of the Florida**  
14 **Class** by the greater weight of the evidence that:

15 (1) Defendant stated that the **Younique Moodstruck 3D Fiber Lashes**  
16 **were "Natural Fibers" and "100% Natural Green Tea Fibers" when the lashes**

17  
18 

---

<sup>6</sup> *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception  
19 occurs if there is a "representation, omission, or practice that is likely to mislead the consumer  
20 acting reasonably in the circumstances, to the consumer's detriment") (quoting *Millenium*  
*Comm'n & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA  
2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at \*3 (S.D. Fla.  
Sept. 13, 2013) ("[T]he Eleventh Circuit has held that the element of causation is met when the  
21 alleged misrepresentations would have deceived an objectively reasonable person.") (citing  
22 *Fitzpatrick*, 635 F.3d at 1283).

23  
24 <sup>7</sup> *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)  
25 ("[M]embers of a class proceeding . . . need not individually prove reliance on the alleged  
misrepresentations. It is sufficient if the class can establish that a reasonable person would have  
relied on the representations."); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.  
4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the  
26 reasonable-person standard).

27  
28 <sup>8</sup> "[A]n act does not need to violate a specific rule or regulation in order to be considered  
deceptive." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of  
Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So.2d 22, 24 (Fla. 4th DCA 1994)).

1       **were actually just ground up nylon;**

2                   (2)   Defendant's conduct has violated the **Florida Deceptive and Unfair**  
3       **Trade Practices Act.** The intent to deceive, or proof that anyone was actually  
4       **deceived, is not necessary.** The **Florida Deceptive and Unfair Trade Practices**  
5       **Act is a statute designed to protect the consuming public and legitimate**  
6       **business enterprises from those who engage in unfair or deceptive acts or**  
7       **practices in the course of trade or commerce.** Under that law it is enough that  
8       **that Younique's alleged misrepresentation had the capacity to deceive a**  
9       **reasonable consumer acting reasonably under the circumstances**<sup>9</sup>. A  
10      **"reasonable person"** does not refer to the any particular member of the **Florida**  
11      **Class. It is a reasonable person in the same position as the Florida Class**<sup>10</sup>. An  
12      **act need not violate a specific rule or regulation to be considered deceptive**<sup>11</sup>.

13                   (3)   Defendant's conduct offends established public policy, or was immoral,  
14       unethical, oppressive, or unscrupulous, or was substantially injurious to the **Florida**  
15      **Class.**

16  
17  
18                   <sup>9</sup> *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception  
19       occurs if there is a "representation, omission, or practice that is likely to mislead the consumer  
20       acting reasonably in the circumstances, to the consumer's detriment") (quoting *Millenium*  
21       *Comm'n & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA  
22       2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at \*3 (S.D. Fla.  
23       Sept. 13, 2013) ("[T]he Eleventh Circuit has held that the element of causation is met when the  
24       alleged misrepresentations would have deceived an objectively reasonable person.") (citing  
25       *Fitzpatrick*, 635 F.3d at 1283).

26                   <sup>10</sup> *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)  
27       ("["M]embers of a class proceeding . . . need not individually prove reliance on the alleged  
28       misrepresentations. It is sufficient if the class can establish that a reasonable person would have  
     relied on the representations."); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.  
     4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the  
     reasonable-person standard).

27                   <sup>11</sup> "[A]n act does not need to violate a specific rule or regulation in order to be considered  
28       deceptive." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of  
     Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So.2d 22, 24 (Fla. 4th DCA 1994)).

1 Source: 3 Florida Forms of Jury Instruction § 65.80; *Urling v. Helms Exterminators,*  
2 *Inc.*, 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); *Trans World Accounts, Inc. v*  
3 *FTC*, 594 F2d 212 (9<sup>th</sup> Cir. 1979)

4  
5 PROPOSED BY: PLAINTIFFS .  
6 GIVEN AS PROPOSED \_\_\_\_\_  
7 GIVEN AS MODIFIED \_\_\_\_\_  
8 GIVEN ON COURT'S OWN \_\_\_\_\_  
9 MOTION  
10 REFUSED \_\_\_\_\_  
11 WITHDRAWN \_\_\_\_\_  
12

13 **INSTRUCTION NO. 54**

14 **Florida Deceptive and Unfair Trade Practices Act: Damages**

15 **54.a Plaintiffs' Proposed Modified Instruction.**

16 Under the Florida Deceptive and Unfair Trade Practices Act the measure of  
17 actual damages is the difference in the market value of the **Younique Moodstruck**  
18 **3D Fiber Lashes** in the condition in which it was delivered and its market value in  
19 the condition in which it should have been delivered according to the representations  
20 of **Younique**.

22 **54.b Defendant's Proposed Modified Instruction.**

23 **For Plaintiff Reilly**

24 Under the Florida Deceptive and Unfair Trade Practices Act the measure of  
25 actual damages is the difference in the market value of the **Younique Moodstruck**  
26 **3D Fiber Lashes** in the condition in which it was delivered and its market value in  
27 the condition in which it should have been delivered according to the representations

1 of Younique.

2

3 **For Ohio Class**

4 Under the Florida Deceptive and Unfair Trade Practices Act the measure of  
5 actual damages is the difference in the market value of the **Younique Moodstruck**  
6 **3D Fiber Lashes** in the condition in which it was delivered and its market value in  
7 the condition in which it should have been delivered according to the representations  
8 of **Younique**.

9

10 **Source:** *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006).

11

12 PROPOSED BY: PLAINTIFFS .

13 GIVEN AS PROPOSED \_\_\_\_\_

14 GIVEN AS MODIFIED \_\_\_\_\_

15 GIVEN ON COURT'S OWN \_\_\_\_\_

16 MOTION

17 REFUSED \_\_\_\_\_

18 WITHDRAWN \_\_\_\_\_

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20 **INSTRUCTION NO. 55**

21 **Affirmative Defense – Statute of Limitations**

22 **Modified:**

23 **Younique** contends that **Plaintiffs'** lawsuit was not filed within the time set  
24 by law. To succeed on this defense, **Younique** must prove that:

25 (a) **Schmitt's claimed harm occurred before August 14, 2013;**  
26 (b) **Reilly's claimed harm occurred before August 14, 2013; and/or**  
27 (c) **Brun's claimed harm occurred before August 14, 2013.**

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**Original:**

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[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]'s claimed harm occurred before [insert date two or four years before date of filing].

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8

**Source:** Judicial Council of California Civil Jury Instructions No. 338

9

**PROPOSED BY: DEFENDANT**

10

**ONLY**

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GIVEN AS PROPOSED \_\_\_\_\_

12

GIVEN AS MODIFIED \_\_\_\_\_

13

GIVEN ON COURT'S OWN \_\_\_\_\_

14

MOTION

15

REFUSED \_\_\_\_\_

16

WITHDRAWN \_\_\_\_\_

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**INSTRUCTION NO. 56**

18

**Affirmative Defense – Standing**

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In order to bring suit, each Plaintiff must have standing under the Federal constitution, or what is known as Article III standing. Younique contends that each Plaintiff lacks standing to bring her claims. To establish standing under Article III, each Plaintiff must show:

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(1) injury in fact, meaning that they have suffered an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. By “particularized,” it is meant that the injury must affect the plaintiffs in a personal and individual way.

24

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(2) causation, meaning that there must be a causal connection between the

1 injury and the conduct complained of – the injury has to be fairly traceable to the  
2 challenged action of Younique, and not the result of the independent action of some  
3 third party not before the court; and

4 (3) redressability of injury, meaning that a remedy to the injury can be had.

5 **Source:** *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, n.1, 569 (1992)

6  
7 PROPOSED BY: **DEFENDANT**

8 **ONLY**

9 GIVEN AS PROPOSED \_\_\_\_\_

10 GIVEN AS MODIFIED \_\_\_\_\_

11 GIVEN ON COURT'S OWN \_\_\_\_\_

12 MOTION

13 REFUSED \_\_\_\_\_

14 WITHDRAWN \_\_\_\_\_

15  
16 **INSTRUCTION NO. 57**

17 **Affirmative Defense – Compliance**

18 If there is a finding that Younique harmed Plaintiffs, Younique contends its  
19 actions were undertaken in good faith compliance with, and pursuant to, statutes,  
20 government regulations and/or industry standards in existence at the time of the  
21 activities.

22 “Good faith” means that Younique acted without actual fraudulent intent or  
23 otherwise actively participate in any fraudulent scheme.

24 **Source:** Judicial Council of California Civil Jury Instructions No. 4207 (for good  
25 faith); *Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1332-3 (2009).

26  
27 PROPOSED BY: **DEFENDANT**

28 **ONLY**

1 GIVEN AS PROPOSED \_\_\_\_\_  
2 GIVEN AS MODIFIED \_\_\_\_\_  
3 GIVEN ON COURT'S OWN \_\_\_\_\_  
4 MOTION \_\_\_\_\_  
5 REFUSED \_\_\_\_\_  
6 WITHDRAWN \_\_\_\_\_  
7

8 **INSTRUCTION NO. 58**

9 **Affirmative Defense – Laches**

10 Younique contends that Plaintiffs' unreasonably delayed in bringing this  
11 lawsuit, and Younique was prejudiced as a result. To succeed on this defense,  
12 Younique must prove by the preponderance of the evidence that:

13 (a) Schmitt unreasonably delayed in bringing suit; or  
14 (b) Reilly unreasonably delayed in bringing suit; or  
15 (c) Brun unreasonably delayed in bringing suit;  
16 and as a result of such delay, Younique was prejudiced.

17 **Source:** *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir.  
18 2002).

19 PROPOSED BY: **DEFENDANT**

20 **ONLY**

21 GIVEN AS PROPOSED \_\_\_\_\_  
22 GIVEN AS MODIFIED \_\_\_\_\_  
23 GIVEN ON COURT'S OWN \_\_\_\_\_  
24 MOTION \_\_\_\_\_  
25 REFUSED \_\_\_\_\_  
26 WITHDRAWN \_\_\_\_\_  
27

## **INSTRUCTION NO. 59**

## Affirmative Defense – Unjust Enrichment

Younique contends that Plaintiffs and Class Members would be unjustly enriched by an award of damages. To succeed on this defense, Younique must show that:

(1) Plaintiffs and Class Members received a benefit from using Younique's Moodstruck 3D Fiber Lashes, because the product worked as promised to enhance the appearance of the eyelashes;

9 (2) Plaintiff Brun and presenter-Class Members received benefits from selling  
10 Younique's Moodstruck 3D Fiber Lashes, such as commissions and discounts on  
11 other Younique purchases; and/or

(3) Plaintiff Brun and Class Members who hosted parties received benefits such as Y cash and half-priced coupons.

14 Additionally, Younique must show that it would be unjust for Plaintiffs and  
15 Class Members to retain these benefits and receive any damages.

**Source:** *Lectrodryer v. Seoulbank*, 77 Cal.App.4th 723, 726 (2000); *accord, Media Services Group, Inc. v. Bay Cities Comm., Inc.*, 237 F.3d 1326, 1330-31 (11th Cir. 2001).

<sup>19</sup> | PROPOSED BY: DEFENDANT

20 ONLY

<sup>21</sup> || GIVEN AS PROPOSED

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22 || GIVEN AS MODIFIED

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<sup>23</sup> || GIVEN ON COURT'S OWN

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24 MOTION

25 | REFUSED

26 WITHDRAWN

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## **INSTRUCTION NO. 60**

## Affirmative Defense – Offset

3 Younique contends that if any award or relief is entered against Younique in  
4 favor of Plaintiffs and Class Members, then the recovery must be offset by the other  
5 value that Younique furnished to Plaintiffs and Class Members (the product worked  
6 as promised to enhance the appearance of the eyelashes; presenters' receipt of  
7 commissions and discounts for selling the Moodstruck 3D Fiber Lashes; party hosts'  
8 receipt of Y cash and/or half-priced coupons for hosting parties to sell the  
9 Moodstruck 3D Fiber Lashes).

**Source:** *Garg v. People ex rel. State Bd. of Equalization*, 53 Cal.App.4th 199, 211-12 (1997); citing *Jess v. Herrmann*, 26 Cal.3d 131, 142 (1979).

13 | PROPOSED BY: DEFENDANT

14 | ONLY

## 15 | GIVEN AS PROPOSED

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**16 | GIVEN AS MODIFIED**

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17 | GIVEN ON COURT'S OWN

18 | MOTION

19 | REFUSED

Dated: January 29, 2019

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Bv: /s/

73/  
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25 | Dated: January 29, 2019

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12 *Attorneys for Defendant Younique, LLC*

14 Local Rule 5-4.3.4 Certification: I hereby attest that all other signatories listed, on  
15 whose behalf this filing is submitted, concur in the filing's content and have authorized  
16 this filing.

17 /s/  
18 Alison M. Bernal  
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